Supreme Court, U.S.
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in the

Supreme Court

of the

United States

October Term, 1979

~~79~~-1210

NO. _____

CHIC EDER and
JAMES EATON STAPLES,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF FLORIDA, COURT OF APPEALS, THIRD DISTRICT

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in the

Supreme Court

of the

United States

October Term, 1979

NO.

CHIC EDER and
JAMES EATON STAPLES,
Petitioners,

vs.

THE STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF FLORIDA, COURT OF APPEALS, THIRD DISTRICT

The Petitioners, CHIC EDER and JAMES EATON STAPLES, respectfully pray that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of Florida, Third District, entered on February 27, 1979, affirming their convictions and sentences.*

*On January 31, 1980, Co-Defendant, LUIS HERNANDEZ, filed his Petition for Writ of Certiorari under Supreme Court Case No. 79-1181.

CITATION TO THE OPINION BELOW

The opinion of the Florida District Court of Appeal, Third District, is reported at 369 So.2d 76 (3rd DCA, Fla. 1979).

JURISDICTION

The Judgment of the District Court of Appeal of Florida, Third District, was entered on February 27, 1979, affirming the Trial Court's denial of Petitioners' Motion to Suppress.[1] The District Court denied a timely Petition for Rehearing on April 16, 1979.[2] On November 7, 1979, the Supreme Court of Florida denied a timely Petition for Certiorari.[3] The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether a peace officer may, under the Fourth Amendment to the Constitution of the United States, conduct a warrantless search of an unoccupied truck parked on private property, in the absence of sufficient probable cause and exigent circumstances necessary to invoke the *Carroll* Doctrine.

2. Whether the principles enunciated in *United States v. Chadwick,* 433 U.S. 1 (1977), and *Arkansas v. Sanders,* 99 S.Ct. 2586 (1977) extend to protect Fourth Amendment privacy interests in sealed, non-opaque packages found in the cargo compartment of a truck.

[1]See Appendix 1.

[2]See Appendix 5.

[3]See Appendix 6.

CONSTITUTIONAL PROVISION INVOLVED

The case, *sub judice,* involves Petitioners' rights to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On October 30, 1976, two City of Miami Police officers received a radio dispatch at approximately 9:00 p.m. advising them that someone had reported seeing several men moving packages or bales from a boat to a truck, along the Miami River. The officers were also advised that the bales might contain marijuana. The officers went to the scene of the alleged activity but saw nothing.[4] The officers then personally contacted the complainant, who merely repeated the information he had already reported and pointed across the river to the general area where he had allegedly seen the unloading.[5] Viewing the scene from the same vantage point as the complainant, the officers were unable to perceive for

[4]See Appendix 8-9.

[5]See Appendix 10-11, 22-23.

themselves the alleged activity. Neither of the officers knew the complainant or previously received any information from him.[6]

The private property involved was surrounded by a fence with only a single dirt road leading to the riverfront. The officers were familiar with the property and knew that it was used primarily by lobster fishermen.[7] The officers went to the described premises and parked their patrol car in a manner blocking the only path to and from the lot, thereby effectively sealing it off so no other vehicle could pass. As they walked toward the river, the officers observed a truck parked facing the street.[8] One of the officers "racked" his shotgun producing a loud noise. Then the officers heard noises which sounded like something or someone scurrying around.[9]

When the officers got to the rear of the truck, they observed someone (Petitioner EDER) backing away from them — down into the Miami River. Petitioner EDER began to swim away despite the officers' demands that he stop.[10] An officer then returned to the truck and opened the back door, discovering numerous large bales of an unknown substance.[11] Before the truck

[6]See Appendix 23-25.

[7]See Appendix 11-12, 31-32.

[8]See Appendix 12-13.

[9]See Appendix 15-16, 27, 32-33.

[10]See Appendix 18-19, 26.

[11]See Appendix 17, 20.

door was opened, no contraband or other illegal activity was observed in the area.[12] One of the bales was cut open, revealing what was suspected to be marijuana, even though the officer was previously unable to identify its contents as contraband by either sight or smell.[13] An officer then boarded the unoccupied boat and found a carbine and shotgun, as well as another bale. The marijuana on board the boat and in the truck were seized.[14] Petitioner EDER was arrested in the water and Petitioner STAPLES approximately 5000′ away.

The Trial Court denied Petitioners' Motion to Suppress,[15] following which Petitioners STAPLES and EDER entered pleas of nolo contendere, with leave to appeal the denial of that Motion. Each was adjudicated guilty and sentenced to three years in the State Penitentiary, to be followed by seven years' probation and fined $10,500.00. On February 27, 1979, the Florida District Court of Appeal, Third District, rendered its decision affirming the Trial Court.[16]

[12]See Appendix 28-29.

[13]See Appendix 20-21, 30-31.

[14]See Appendix 22, 33-34.

[15]See Appendix 34-35.

[16]See Appendix 1.

REASONS FOR GRANTING THE WRIT

1. The Court below has decided a Federal question of substance in a way probably not in accord with applicable decisions of this Court.

A. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971).

In upholding the warrantless search of the truck over which Petitioners were alleged to have knowledge and control, the Florida District Court of Appeal, Third District, has denied Petitioners their Constitutional right to be free from an unreasonable search and seizure. The opinion below conflicts with the general Constitutional principles established by decisions of this Court and particularly with respect to *Coolidge v. New Hampshire,* 403 U.S. 443 (1971). The plurality in *Coolidge* struck down the search of an unoccupied car parked on private property, holding that there were no exigent circumstances to justify the warrantless search. *Id.,* at 2033-37.

It is firmly established that evidence of criminal action may not, save in very limited and closely confined situations, be seized without a judicially-issued search warrant. *Frank v. Maryland,* 359 U.S. 360 (1959).

> [T]he most basic constitutional rule in this area is that 'searches [and seizures] conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well delineated exceptions.'

Coolidge v. New Hampshire, supra, 403 U.S. at 454-455, quoting *Katz v. United States,* 389 U.S. 347, 357 (1967).

Petitioners respectfully submit that the only possible justification applicable to the warrantless search of the truck is under the "automobile exception" promulgated by *Carroll v. United States,* 267 U.S. 132 (1925), and its progeny, *Chambers v. Maroney,* 399 U.S. 42 (1970). Petitioners contend that this is so because the search was not based on consent or incident to an arrest, nor was there a "plain view" seizure. See, *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973); *Chimel v. California,* 395 U.S. 752 (1969); *Coolidge v. New Hampshire, supra.* Petitioners further contend that the "stop and frisk" exception, *Terry v. Ohio,* 392 U.S. 1 (1969), is equally inapplicable to the case *instanter.*

In *Chambers v. Maroney, supra,* 399 U.S. at 51, this Court read *Carroll* as holding that

> . . . a search warrant [is] unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. . . . [T]he opportunity to search is fleeting. . . .

Thus, under the *Carroll* "automobile exception", a warrantless search is reasonable when two factors are present:

1. The officer has probable cause to believe that the automobile contains contraband, and

2. There are exigent circumstances associated with the automobile making it impracticable to secure a warrant.

Petitioners contend that the officers *sub judice* did not have probable cause to believe the truck contained contraband. The Court, in attempting to define probable cause, has noted that it requires "less than evidence which would justify conviction", but yet "more than bare suspicion". *Brinegar v. United States,* 338 U.S. 160, 175 (1949). The record here clearly establishes no independent knowledge on the part of the officers to sustain the belief that the law was being violated. Moreover, the information supplied by the complainant, his observation of packages being transferred from a boat in an area regularly used by fishermen, without indicia of illegality, cannot supply sufficient probable cause for the subsequent warrantless search. Cf., *Spinelli v. United States,* 393 U.S. 410 (1969).

Assuming, *arguendo,* that the officers did have probable cause, nevertheless, the absence of exigent circumstances renders the warrantless search of the truck unreasonable under the Fourth Amendment. *Carroll* does not allow an officer having probable cause to seize any automobile, but only those automobiles which are movable and for which "it is not practicable to secure a warrant". 267 U.S. at 153.

> [N]o amount of probable cause can justify a warrantless search absent 'exigent circumstances'.

Coolidge v. New Hampshire, supra, 403 U.S. at 468.

Mr. Justice Stewart, writing for the plurality in *Coolidge, supra,* emphasized the lack of sufficient exigent circumstances to justify the warrantless search. Coolidge's car was regularly parked in the driveway of his house, he was arrested inside the house, he had no access to the automobile after the police arrived on his property, the Coolidge property was under guard by two other officers, the police had known for some time of the probable role of the car in the crime, and the automobile was not being used for any illegal purpose.

> [T]here is nothing in this case to invoke the meaning and purpose of the rule of *Carroll v. United States* — no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile.

Coolidge v. United States, supra, 403 U.S. at 463.

Petitioners respectfully submit that the lack of exigent circumstances, as demonstrated by the record, renders the *Carroll* doctrine inapplicable to the instant case, thus the opinion below conflicts with general Constitutional principles set forth in the Court's plurality opinion in *Coolidge v. United States, supra.* The truck *sub judice* was parked on private property and was not stopped along the highway. The officers had the property where the truck was located effectively sealed off. Their partrol car was parked so as to block the only ingress and egress to and from the property. No one was seen in or near the truck. The only person in the

area that the officers were aware of was in the Miami River swimming away. As in *Coolidge,* it simply was not reasonably impractical for the officers to secure a warrant before conducting the search. 403 U.S. at 463; see also, *United States v. Young,* 489 F.2d 914 (6th Cir. 1974); *United States v. McCormick,* 502 F.2d 281 (9th Cir. 1974); *United States v. Robinson,* 533 F.2d 578 (D.C. Cir. 1975).

At the most, this case may involve a potential, as opposed to a present exigency. However, the plurality in *Coolidge* rejected mere speculative exigencies based on potential mobility:

> [i]t is, of course, true that even though Coolidge was in jail, his wife was miles away in the company of two plainclothesmen, and the Coolidge property was under the guard of two other officers, the automobile was in a literal sense 'mobile'. A person who had the keys and could slip by the guard could drive it away. We attach no constitutional significance to this sort of mobility.

403 U.S. at 461 n. 18.

Petitioners recognize that the Court has upheld some warrantless searches in the absence of an immediate danger that the vehicle would be removed from the jurisdiction, e.g., *Chambers v. Maroney,* 399 U.S. 42 (1970); *Cady v. Dombrowski,* 413 U.S. 433 (1973); *Cardwell v. Lewis,* 417 U.S. 583 (1974); *Texas v. White,* 423 U.S. 67 (1975); *South Dakota v. Opperman,* 428 U.S. 364 (1976). However, these cases are readily distinguishable in that the truck *sub judice* was not

impounded and subjected to an inventory search, rather, it was unoccupied and parked on private property. In distinguishing *Chambers v. Maroney, supra,* the plurality in *Coolidge* noted that:

> [t]here is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose.

403 U.S. 462 n. 20.

B. *United States v. Chadwick,* 433 U.S. 1 (1977) and *Arkansas v. Sanders,* 99 S.Ct. 2586 (1979).

Additionally, Petitioners raise the issue of whether the opinion below conflicts with this Court's opinions in *United States v. Chadwick,* 433 U.S. 1 (1977), and *Arkansas v. Sanders,* 99 S.Ct. 2586 (1979).

In *United States v. Chadwick, supra,* the Court held that a warrant must be obtained, even though probable cause exists, when a locked footlocker is taken from the open trunk compartment of a suspect's automobile and placed securely in police custody. In *Arkansas v. Sanders, supra, Chadwick* was cited as the Court invalidated a similar search of an unlocked suitcase. Petitioners contend that the Fourth amendment principles which invalidated the searches in *Chadwick* and *Sanders* should also provide protection for those who place personal effects, here the non-

opaque packages, in a closed cargo compartment of a truck.

The cargo compartment of a truck — like the trunk of an automobile, when compared to the other parts of the vehicle, does not share in the "diminished exception of privacy which surrounds the automobile". *United States v. Chadwick, supra,* 433 U.S. at 12. Moreover, Petitioners contend that the cutting open of the non-opaque sealed bales *sub judice* is directly analogous to the opening of the footlocker and suitcase condemned by the Court in *Chadwick* and *Sanders*. Thus, assuming, *arguendo,* that this case does fall within the *Carroll* "automobile exception", nevertheless, the warrantless search of the bales found in the back of the truck was unreasonable under the Fourth Amendment.

CONCLUSION

The Petitioners have been denied basic fundamental rights guaranteed by the United States Constitution. They seek relief in this Court to restore those rights. Based on the arguments and authorities cited herein, Petitioners CHIC EDER and JAMES EATON STAPLES, respectfully request this Honorable Court to grant a Petition for a Writ of Certiorari to the State of Florida, Court of Appeals, Third District, reversing that Court's decision.

Respectfully submitted,

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By:_____
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APPENDIX

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[NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.]

IN THE DISTRICT COURT OF APPEAL,
OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1979

CASE NOS. 77-1682
77-2412

LUIS HERNANDEZ, JAMES EATON STAPLES, and CHIC EDER,

Appellants,

vs.

THE STATE OF FLORIDA,

Appellee.

Opinion filed February 27, 1979.

Appeals from the Circuit Court for Dade County, Ira L. Dubitsky, Judge.

Michael Kennedy and Paul Costeleiro; Jack Attias; Hirschhorn & Freeman and Joel Hirschhorn, for appellants.

Jim Smith, Attorney General and James H. Greason, Assistant Attorney General, for appellee.

Before HAVERFIELD, C.J., and PEARSON and BARKDULL, JJ.

PER CURIAM.

These appeals have been consolidated for appellate disposition because they grow out of the same factual situation. Chic Eder and James Eaton Staples appeal a judgment finding them guilty of possession of over one hundred pounds of marijuana, entered upon their plea of nolo contendere, reserving their right to appeal the trial court's order denying their motions to suppress evidence of the marijuana, which was found in a truck and over which they were alleged to have had knowledge and control. The defendant Luis Hernandez appeals a judgment finding him guilty of the same crime. Hernandez was tried before a jury and found guilty.

Each of the defendants has a point urging error upon the trial court's denial of defendants' motion to suppress. For the determination of this question, it is necessary briefly to present the facts as revealed by the record. These facts will be set out in the light most favorable to the order of the trial judge. See Ponder v. State, 323 So.2d 296 (Fla. 3d DCA 1975); and Rodriguez v. State, 189 So.2d 656 (Fla. 3d DCA 1966).

Two police officers received a radio dispatch that an unidentified caller saw several men unloading bales from a boat at night in the Miami River. When the officers saw nothing in the area, they radioed for more

information and were given the location of the caller. They contacted the caller, who gave them no further information other than pointing to the general location of the activity he allegedly saw. The officers proceeded to the private property involved. It was an area where lobsters and fishing boats frequently unload. The officers parked their car so as to block ingress and egress to and from the lot. With firearms drawn, they entered the property, saw a truck and heard a rustling noise in the surrounding bushes. Defendant Eder was seen near a moored boat backing into the water. As the officer approached him, Eder began to swim away. The officer returned to the back of the truck, looked inside through the rear door and saw bales of an unidentified substance enclosed in opaque material. One officer observed what he believed to be marijuana on the loading platform of the truck and thereafter cut open one bale to find a substance he recognized as marijuana.

Another police officer later spotted three heads bobbing in the river, one of whom he identified as Hernandez. Hernandez was not wearing a shirt, but a shirt was found aboard the boat on which the marijuana was seized. The officers seized the marijuana in the truck and on the boat.

We hold that the evidence is sufficient to show a probable cause to search the area and the truck which contained the contraband. We further hold that there was adequate, legally-sufficient evidence to withstand defendant Hernandez's motion for judgment of acquittal in that the evidence viewed in the light most favorable to the State shows a prima facie case. See Everett v. State, 339 So.2d 704 (Fla. 3d DCA 1976).

Defendant Hernandez urges, in addition to his claim that the evidence was insufficient, that he should be granted a new trial because a state requested instruction given by the court tended to place the burden on him of disproving his own guilt. We have examined the instruction to which objection was made and hold that it was properly given. See Selph v. State, 22 Fla. 537 (1886); and U.S. v. Llamas, 280 F.2d 392 (2d Cir. 1960).

Having examined the contentions of each appellant in the light of this record and finding no error, the judgments and sentences are affirmed.

Affirmed.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1979

MONDAY, APRIL 16, 1979

CASE NOS. 77-1682
77-2412

LUIS HERNANDEZ, JAMES EATON STAPLES and CHIC EDER,

Appellants,

vs.

THE STATE OF FLORIDA,

Appellee.

Counsel for Hernadez and Eder and Staples having each filed petition for rehearing and motion to stay mandate, and same having been considered by the court which determined the cause, it is ordered that said petitions and motions be and they are hereby severally denied.

A True Copy
ATTEST:

/s/ [Illegible]
Clerk District Court of
Appeal, Third District

SUPREME COURT OF FLORIDA

WEDNESDAY, NOVEMBER 7, 1979

CASE NO. 56,664

District Court of Appeal,
Third District

77-1682
77-2412

LUIS HERNANDEZ, ET AL.,
Petitioners,

vs.

STATE OF FLORIDA,
Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R.App.P. 9.330(d).

BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., Concur

ADKINS, ACTING C.J., Dissents

A True Copy
TEST:

Sid J. White
Clerk Supreme Court.

By: TANYA CARROLL
Deputy Clerk

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
(Criminal Division — Dubitsky)

NO. 76-9380

STATE OF FLORIDA,

Plaintiff,

vs.

LUIS HERNANDEZ, JAMES EATON STAPLES, CHIC EDER and OSORIO LOPEZ,

Defendants.

MOTION TO SUPPRESS

The above-entitled cause came on for hearing before the Honorable Ira L. Dubitsky, Judge of the above-styled court, at the Metropolitan Justice Building, Miami, Florida, on the 18th day of April 1977, commencing at approximately 11:00 a.m.

A. The police unit that I was in received a call, reference a suspicious activity at the north side of the 5th Street Bridge.

Q. Was there a description of the suspicious activity given in the radio call?

A. Yes, there was.

Q. Would you tell the Court what that was?

A. The radio call stated that there were several men taking large packages or large bales off a boat and loading them into a truck. And the truck was, I believe, aluminum or silver-type truck that was parked in the dark along with the boat that was also parked in the dark.

Q. Do you recall whether or not the radio message contained what the caller suspected was in those bales?

A. Yes. The radio message advised that it was possible packages of marijuana.

Q. Did you have occasion to respond to the scene after that call?

A. Yes, we did.

Q. And who is "we," by the way?

A. Myself and Officer Adrian Martin.

Q. Where did you respond to?

A. We responded to the north side of the 5th Street Bridge.

Q. Did you make any observations at that time?

A. Yes, we looked on the north side of the 5th Street Bridge and couldn't locate anything right in that immediate confines there; so, we contacted the complainant.

Q. Was the complainant's address given in the radio call?

A. Who was the complainant? The complainant was Herbert Halliwell.

Q. Do you remember the address at which he was living?

A. He was at 801 Northwest 4th Street.

Q. Did you respond to the residence of Mr. Halliwell?

A. We responded to the area of his residence. He has a boat that's moored and is docked there.

Q. Did you speak with him at that time?

A. Yes, I did.

Q. What was Mr. Halliwell's demeanor during the course of this conversation?

A. He seemed sober and concerned.

Q. What did he tell you at that time?

MR. ATTIAS: Objection, hearsay, your Honor.

THE COURT: Overruled.

THE WITNESS: He stated that across the river from him, on the north side of the Miami River, there was a boat that was docked — approximately 37 to 40

foot boat — and there was a truck backed up to the boat. And, there were several men that were taking large packages off the boat and loading them into the back of the truck.

Q. Was there anything about Mr. Halliwell's demeanor that caused you to disbelieve the information he was giving you?

A. No.

Q. Did you respond to the area which he indicated?

A. Yes, I did.

Q. How did you respond there?

A. We went north up 7th Avenue to, I believe, it's Northwest 7th Street and turned and went over the bridge, westbound; at which point, we came to, I believe, it's Northwest 7th Court and went southbound to the intersection of Northwest North River Drive and Northwest 7th Court. There is a large lot at that location that has a fence and a dirt road that goes back up and is usually used by lobster

---

A. One of my partners, his father was a lobster fisherman, and he directed my attention to this area.

MR. KENNEDY: Objection. We are now bringing hearsay into it. This could not possibly relate to probable cause.

MR. ATTIAS: And it goes back five years.

THE COURT: Overruled.

BY MR. GILBERT:

Q. Would you tell us how that area is used by the fishermen?

A. Yes. The boats, that are the lobster boats, that are used by the fishermen, are docked there. And, by the same token, they also have their lobster traps stored there. They're outside with the wooden boxes and the buoys — the little white and red different colored buoys that they use. And I have never seen, in my experience, anything in there except maybe a car or two parked that would possibly belong to a lobster fisherman.

Q. Do you recall ever having seen any large trucks about the size of the one you came in contact with that evening?

A. Never.

Q. Do you know whether the activity of the lobster fishermen is confined mostly to the day, evening, or night hours?

A. I couldn't say. I am not sure.

Q. I'd ask if you would please describe what you did when you came up to the fence?

A. Parked the police car, blocking the exit or entrance to the area and turned the lights off and exited the vehicle.

Q. Continue, if you would, please. What took place next?

A. Officer Martin and myself — I was a passenger in the police car — we exited the police vehicle and walked approximately 25 yards or so towards the Miami River, south from where we parked the vehicle.

Q. Are there any restricted signs with respect to the entrance on that property?

A. No.

Q. Are there any "No Trespass" signs; anything such as that?

A. No.

Q. Do you know, of your own experience, of any restrictions of persons entering onto that property?

A. No, I do not.

Q. Continue, if you would, please.

A. Officer Martin and myself walked up. When we got about five yards south of the front of the police vehicle, I looked to the right in a southwesterly direction and noticed a large aluminum truck parked with its front facing me and the back facing a southwesterly direction next to the water.

Q. What was the lighting in this area?

A. It was dark.

Q. I'd ask, if you would please take this red pen and circle the area on the map — or the picture that has been introduced into Evidence — the approximate position of the truck on that night and put, if you would, the word truck inside that circle.

(Witness complies.)

Q. That's back inside the trees?

A. Yes. It has a clear view from this dirt drive out there. However, from back here, you cannot see it.

Q. Indicating the — what corner of the property would that be?

A. This corner?

Q. Yes.

A. This would be the northwest corner.

radio call had said "suspected marijuana". I was concerned as to my safety and what could possibly be going on here.

Q. Are there any dangers involved to the investigation of large quantities of narcotics?

A. Yes, quite a few.

MR. KENNEDY: Objection, your Honor. We are dealing with marijuana, which is not a narcotic.

THE COURT: Rephrase it.

MR. KENNEDY: Secondly, there is danger in all occupations, it seems to me, including being a lawyer.

BY MR. GILBERT:

Q. Are the dangers any greater with the investigation of large quantities of narcotics and drugs than they are in other areas of police work?

MR. KENNEDY: Same objection, your Honor.

THE COURT: Sustained.

BY MR. GILBERT:

Q. What, if anything, did you hear or see upon racking your shotgun?

A. There was a great deal of movement in the area of the truck. It sounded as if people were running or —

Q. Were you able to tell —

THE COURT: Do you want to let him finish his answer?

THE WITNESS: That's all.

BY MR. GILBERT:

Q. Were you able to tell whether or not the sound was being produced by more than one person or object going through the woods?

MR. KENNEDY: Objection. That seems — the persons were making the sounds as opposed to something else.

MR. GILBERT: I said persons or objects.

MR. ATTIAS: It's also leading, your Honor.

THE COURT: Overruled.

BY MR. GILBERT:

Q. You may answer the question.

A. Yes. In my experience, I have heard numerous people running, and it sounded as if there were people, in fact, behind the truck that were scurrying around.

Q. More than one at least?

A. At least.

Q. Could you tell, from about where you were, the direction in which the people were running?

A. No, I could not.

A. I believe it was strictly early in the morning. It was still dark at that time.

Q. Were you aware of all these things at the time that you came to the rear of the truck on October 30th, 1976?

A. Yes, I was.

Q. At the time you came to the rear of the truck, do you know, for a fact, whether or not anyone had secreted items inside of the truck?

A. No, I did not.

Q. Whether or not anyone had secreted themselves inside of the boat that you were coming back to?

A. No, I did not.

Q. What, if anything, did you think when you reached the back of the truck?

A. I reached the back of the truck, and the back of the truck was closed. However, it was not locked, and I briefly glanced at the boat. And I turned around and raised the door of the back of the truck to see if there was anyone inside and to see if there was any suspected contraband.

Q. At the time that you lifted the door, did you have a belief, in your own mind, as to what was inside the truck?

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marijuana, from the information we had received over the police radio and from the circumstances involved where you have the boat parked and the truck parked. And, I was also concerned as to if someone may be in the back of the truck.

Q. Based upon this belief, did you believe that there was reason to concern for your safety and the

safety and the safety of Officer Martin who was with you?

A. Yes, I did.

Q. Going back to the person that you saw by the boat at the time you arrived at the back of the truck, what, if anything, did you see that person do?

A. When I saw this person, I pointed my shotgun and advised him that I was the police and to stop and to approach me.

Q. How were you dressed at the time?

A. In a police uniform.

Q. Full uniform, badge, holster, and whole attendant uniform?

A. Yes.

Q. And what happened when you advised him to halt and approach?

A. I believe I told him approximately twice to stop and not move. And, at that point, I started to approach him; at which time, he started backing away from me into the Miami River. And, when he got about knee-deep or so, he went down into the water and began swimming.

Q. Approximately how many times did you call out to this person asking him to stop?

A. Over a period of the next several minutes, I told him to stop at least six or seven times.

Q. How many of those times occurred prior to the time you opened the back of the truck?

A. I believe twice.

Q. And was there anything that you know of that would have prevented him from hearing you tell him to stop or advising him that you were of the Police Department?

MR. KENNEDY: Objection, your Honor. There is no way that the man could possibly know that. It's speculative.

THE COURT: Read the question back.

(Thereupon the question referred to was read back by the court reporter.)

MR. KENNEDY: I didn't hear it that way. I'd object to the form.

THE COURT: Overruled.

MR. KENNEDY: Then, I would object that it's impossible for this man to determine what another person can hear.

THE COURT: He only asked if there was anything that he knew of that would prevent anybody from hearing. That doesn't mean that there wasn't

something that anybody else knew of. Insofar as it is limited, I think you may answer.

THE WITNESS: There was nothing that I knew of that would prevent it.

BY MR. GILBERT:

Q. Was it at that time that you turned and went to the rear of the truck and opened it?

A. I was still standing at the rear of the truck.

Q. And what, if anything, did you observe upon opening the rear of the truck?

A. I observed the truck approximately three-quarters full with large bales of an unknown substance. At that particular time, that was loaded or packaged in an opaque-type material and also bound by burlap or canvas.

Q. Going back to the questions I asked earlier about your belief about the way in which marijuana is brought into the continental United States, prior to that time, did you have any information as to

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THE COURT: I think that's why they have cross-examination.

MR. KENNEDY: It's difficult to cross-examine when there is no time-frame.

THE COURT: You may place the time-frame, if you wish, on cross-examination.

BY MR. GILBERT:

Q. Did you have occasion to smell the contents of the back of the truck?

A. Yes.

Q. And what, if anything, did it smell like at that time?

A. It smelled like dry grass or hay or some type of material.

Q. Prior to that time, had you ever smelled marijuana in large quantities?

A. No.

Q. What, if anything, did you do upon opening the back of the truck and perceiving these items?

A. I took a pocketknife out and cut one of the bags open.

Q. What, if anything, did you observe?

A. What I suspected to be marijuana.

Q. Would you continue and tell us what took place after this?

A. At that point, I advised, over the police radio, what we had found and asked for additional units to come into the area; and I had one man in the water and possibly there could have been other suspects involved.

Q. Do you know whether entry was made onto the boat that was parked near the truck?

A. Yes.

Q. Did you know who it was — the first person to make the entry onto the boat?

A. Yes, I do.

Q. Who was that?

A. Officer Martin.

Q. Based upon what you had observed on the scene, had you, in your own mind, drawn a conclusion as to whether or not that boat was involved with the marijuana on the truck?

A. Yes, I did.

Q. And what was your conclusion?

A. My conclusion was yes, that the boat had brought the marijuana and that it was being unloaded off of the boat and into the back of the truck.

MR. GILBERT: I have nothing further of this officer.

Q. What did he tell you?

A. I really couldn't tell you exactly what it was, because it's been quite some time back. I believe that he stated the same thing that the radio dispatch had said;

that there were several men over there that were taking things off the boat — large bales off the boat and putting them in the truck.

Q. That's, in fact, all that he told you?

A. As far as I can remember.

Q. And isn't it also correct that you had no knowledge of this individual prior to that time?

A. That's correct.

Q. That you never, at any time in the past, had received any information, to your knowledge, from him relating to any criminal activity whatsoever?

A. Not that I know of.

Q. And it was the first time that this man ever conveyed any complaint to you of any nature whatsoever; is that correct?

A. Yes.

Q. At the time you spoke to him, did he point in the direction from where he saw this particular activity?

A. From where he saw it?

Q. Yes.

A. Yes.

Q. Isn't it true, when he pointed in that direction, you weren't able to ascertain any activities that he was referring to as you couldn't see any activity?

A. That's correct.

Q. Isn't it true, Officer, that prior to the time you entered — excuse me — opened the truck that you did not have any facts upon which to base or believe that a crime had been committed or was about to be committed; isn't that true, sir?

A. Facts I didn't have, no.

Q. You had suspicions only; is that correct?

MR. GILBERT: Objection.

THE COURT: Overruled.

THE WITNESS: That's correct.

MR. ATTIAS: Thank you, Judge.

THE COURT: Anything further?

MR. KENNEDY: Excuse me?

THE COURT: I mean from Mr. Attias?

MR. ATTIAS: No.

THE COURT: Okay, Mr. Kennedy.

BY MR. KENNEDY:

Q. About 200 yards from the bridge to where this boat was docked?

MR. GILBERT: Objection, repetitious.

THE COURT: Sustained.

BY MR. KENNEDY:

Q. Approximately, what is the distance — approximating the position that Mr. Halliwell was in when he was pointing out this area — where this incident was occurring?

A. I don't know the exact distance; whatever the distance is from one side of the river to the other.

Q. Can you give us your best estimate of that, sir?

A. I would say it's approximately 75 to 100 yards across the river.

Q. When Mr. Halliwell pointed across the river to that area, you were not able to see anything going on over there?

A. From the area I was standing, that's correct.

Q. You indicated before that Mr. Halliwell was not an individual who was known to you to be a reliable or a credible informant?

A. That's correct.

Q. When you walked up to Position X on State's Exhibit Number 1, in what appears to be a cleared area, that is when you first observed the truck?

A. That's approximately the location.

Q. What was the distance separating you from the truck?

A. I'd say 25 yards.

Q. Would you resume your seat, please.

As you approached the truck all that you knew was that some individuals had been unloading something from a truck; is that correct?

A. That's all the information that I had received other than the police radio broadcasts.

Q. When you approached the truck, you saw, as you began walking up to the truck, you saw no people around the truck; I believe was your testimony? Is that correct?

A. That's correct.

Q. At some point, you saw an individual near the water; correct?

A. Correct.

Q. Was that before or after you had opened the back of the truck?

Q. How do people sound when they scurry around?

MR. GILBERT: Objection.

MR. KENNEDY: As opposed to animals scurrying around, for example.

THE COURT: Overruled.

THE WITNESS: I couldn't really say.

BY MR. KENNEDY:

Q. So they could have been animals?

A. Could have been.

Q. Now, this door that you have to open is the type of — it's a metal door; is it not?

A. I believe.

Q. And it's the type of door that you have to open from the bottom up?

A. Correct.

Q. It's not the type of door that you can swing open?

A. No.

Q. It's rather noisy when it is opened; is it not?

A. I believe so.

Q. And rather noisy when it is closed; wouldn't you believe?

A. Yes.

Q. You didn't hear that door being closed as you approached the truck, did you?

A. No, I didn't.

Q. Isn't it also a fact, based upon your observation, that the truck door can only be opened from the outside?

A. No. I worked for a truck company at one time, and you can close them from the inside.

Q. The same kind of a truck?

A. Yes.

Q. Okay. Would it be fair to say that that door was closed sometime — the door of that truck was closed before you approached the truck?

MR. GILBERT: Objection.

THE COURT: Sustained.

BY MR. KENNEDY:

Q. So you are saying, at the edge of the door, you don't smell anything at that time; do you?

A. No.

Q. You don't know what is contained in the truck?

A. No.

Q. You can't see any contraband anywhere around, can you?

A. Not in plain view, no.

Q. And you don't have X-ray vision?

A. No.

Q. You don't see any contraband of any sort on the boat —

A. No, from where I am standing.

Q. (Continuing) — or on the grounds, at all, on the boat or truck?

A. No.

Q. You then opened the door?

A. That's correct.

Q. Upon opening the door, you observed several bales; is that correct?

A. I observed a large truck, approximately two-thirds full of large bales.

Q. Isn't it a fact that even at the point after you raised the door and looked in, and you saw the bales, even at that point, you didn't know what, if anything, those bales contained; did you?

MR. GILBERT: Objection.

THE COURT: Overruled.

THE WITNESS: I had an idea, a real good idea of what they contained.

BY MR. KENNEDY:

Q. But you didn't know, did you?

A. No, not for a fact.

Q. And, in your prior deposition, you were asked whether or not a smell emanated from the back of that truck; is that correct?

MR. GILBERT: Objection, form.

THE COURT: Sustained as to form.

BY MR. KENNEDY:

Q. Your first impression, upon opening the truck, was that there were bales of something such as alfalfa or hay, isn't that true?

A. That's what I stated in my deposition.

Q. And that is true; is it not?

A. It smelled like some type of dried grass or something like that.

Q. So with all of this extensive experience of yours, and all the information you got from Vice and Narcotics over the years, and all the positions you had, and the fact that you smelled marijuana before, even when you opened the gate or the door, did you still think it could just be alfalfa?

MR. GILBERT: Objection.

THE COURT: Sustained.

Any redirect?

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walked back to the area that the complainant had indicated.

Q. And, had you been in that area before?

A. Yes.

Q. Have you ever had occasion to patrol the area of those lobster traps?

A. I have spent almost my whole police career in that area.

Q. Approximately how many times have you had occasion to observe the type of activity that goes on after dark in that area?

A. I couln't even tell you how many times. It's a

routine patrol area that we cover maybe once a night, maybe a couple of times a night.

Q. Are we talking about more than 10 or 20 times, more than 100 times.

A. Over five years, yeah.

Q. More than 100 times?

A. I would say approximately more than 100 times.

Q. Okay. And, what, if anything, did you do upon entering into this area?

A. There was a little dirt road; we walked back and we had gone maybe 50, 75 feet; and observed a truck facing us, backed up under the trees in the dark.

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that point, it appears to us that this is what our call was in reference to. And, Officer Sheppard walked in front of me. I was behind Officer Sheppard, and, we started to walk towards the truck, when he racked his shotgun.

Q. What do you mean by racked a shotgun?

A. Engaged a shell.

Q. When this happens is a noise produced?

A. Yes.

Q. And, what if anything, happened after the noise was produced?

A. That's when we heard a lot of rapid movements coming from the area behind the truck.

Q. And, during the course of your employment as a police officer, had you had occasion to work with individuals who are either using or dealing in narcotics?

A. Yes, in my area, just about every day.

Q. In what capacity do you come in contact with them?

A. Either arrest, complaints, and on calls; speaking with them in the street.

Q. Have you worked in plain clothes with individuals in narcotics traffic?

A. I worked a few details in plain clothes;

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upon entering the boat?

A. As soon as I stepped into the boat, I shot my flashlight towards the front; a shotgun and carbine were the first things I saw. I opened the door to the front cabin of the boat, I proceeded to the front of the boat to make sure that there was no one hiding in there, that the boat was unoccupied. As soon as I got up to the door with the flashlight, there was another bale lying on the floor just like in the truck.

MR. GILBERT: I ask that this be marked as the next numbered state exhibit for indentification.

THE CLERK: State Exhibit B for indentification.

BY MR. GILBERT:

Q. I'll show you what has been marked as State Exhibit One B for indentification; and ask you if you can recognize what is depicted in the photograph?

A. A carbine and a shotgun.

Q. What particular carbine and shotgun is depicted in this photograph?

A. This is a photograph of the leftside front of the boat that we have been talking about,

have. I think it would be unreasonable to require that he did.

There was a secondary motive there, and I'm satisfied it was secondary as far as concern for his safety. I'm satisfied that primarily they were searching when they went in there for the evidence. And, I don't think that they acted unreasonably in doing so. In any event, going from this they then wanted to go to the opposite end of the ramp to see if indeed anything remained, or anybody remained on the boat. And, I don't think under the circumstances they acted unreasonably in doing that either, for the same reasons. Obviously, whatever probable cause they had to enter into the truck, was not diminished by what they found, but only strengthened and lent additional weight to the hypothesis that there would be either people or property connected with what was on the truck, on the boat. I think they acted

reasonably in going go the boat. So, I'll deny the Motion to Suppress.

MR. GILBERT: Your Honor, the Motion to Suppress also mentions weapons found on the boat, the additional Motion to Suppress.

THE COURT: Well, I understand, and I'm indicating that I'm denying it as to everything